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APR 21 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: MM Docket No. 93-107  
Channel 280A  
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Supplement to Second Motion to Enlarge the Issues Against ASF."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:

  
Stephen T. Yelverton

Enclosure

B:CATON.135

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction  
Permit for a New FM Station,  
Channel 280A, Westerville,  
Ohio

To: The Review Board

)  
)  
) MM Docket No. 93-107

)  
) File Nos. BPH-911230MA

)  
) through

)  
) BPH-911231MB  
)

SUPPLEMENT TO SECOND MOTION TO  
ENLARGE THE ISSUES AGAINST ASF

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: \_\_\_\_\_

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April 21, 1994

B:CATON.135

SUPPLEMENT TO SECOND MOTION TO ENLARGE ISSUES AGAINST ASF

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.229 (b)(1) of the Commission's Rules, hereby submits this supplement to motion to enlarge the issues against ASF Broadcasting Corp. ("ASF"). On May 25, 1993, ORA filed a motion to enlarge the issues against ASF. That motion raised a tower site availability issue. Although the motion was denied by the Administrative Law Judge in Memorandum Opinion and Order, FCC 93M-394, released June 24, 1993, ORA timely filed exceptions on December 20, 1993. See, ORA exceptions, paras. 82-84. Accordingly, this matter is now properly before the Review Board.

This supplement results from information submitted by ASF in a petition for leave to amend concerning the status of its tower site, filed on April 15, 1994. Thus, the supplement is timely filed within fifteen (15) days of ASF's submission.

ORA requests leave to file this supplement. Although the Commission has stayed or frozen the integration aspect of comparative hearings, the basic qualifying or non-integration aspects appear to remain unaffected. See, FCC Public Notice, FCC 94-41, released February 25, 1994. Because the information contained in ASF's April 15, 1994, submission raises a tower site qualifications issue, the filing of this supplement is appropriate. In support of its supplement to the motion to enlarge the issues, ORA submits the following comments.

ASF previously disclosed that it had received a purported tower site agreement in December 1991 from Mid-Ohio Communications, Inc. The December 1991 letter states in pertinent part that Mid-Ohio is "willing to negotiate" and has an "intent to negotiate" with ASF as to use of its transmitter tower and facilities. Moreover, "mutually acceptable terms" would be negotiated in the future. Within sixty (60) days of the date of the letter, ASF was required to make a satisfactory showing to Mid-Ohio of its financial qualifications to enter into lease arrangements for the tower and facilities.

In its April 15, 1994, submission, ASF disclosed that Mid-Ohio had sold its proposed tower site. Although ASF did not submit a copy of a letter from Mid-Ohio notifying it of the sale, other applicants in this proceeding which had

proposed the same tower site received an identical letter from Mid-Ohio, dated March 2, 1994, notifying them of the sale. Therein, Mid-Ohio confirmed that its December 1991 agreement with the Westerville applicants was only a "willingness to negotiate" as to the "possible" lease of the tower site.

Under long-established Commission policy, ASF did not have "reasonable assurance" of Mid-Ohio's tower site. National Communications Industries, 6 FCC Rcd 1978, 1979, para. 10 (Rev. Bd. 1991), aff'd, 7 FCC Rcd 1703, para. 2 (1992); Progressive Communications, Inc., 3 FCC Rcd 5758, 5759, para. 9 (Rev. Bd. 1988), "reasonable assurance" of the availability of a tower site requires more than a vague "willingness to deal" on the part of the tower site owner; Rem Malloy Broadcasting, 6 FCC Rcd 5843, 5846, para. 14 (Rev. Bd. 1991), the fact that the site owner could foresee no problem in giving a lease does not constitute "reasonable assurance" where lease terms remain to be negotiated, citing William F. and Anne K. Wallace, 49 FCC2d 1424, 1427 (Rev. Bd. 1974); Adlai E. Stevenson, 5 FCC Rcd 1588, 1589, para. 6 (Rev. Bd. 1990), the fact that the site owner has indicated that he will discuss the possibility of a lease at some future date is insufficient, citing El Camino Broadcasting Corp., 12 FCC2d 25, 26 (Rev. Bd. 1968).

A "willingness to negotiate" does not constitute "reasonable assurance." Emission de Radio Balmeseda, Inc., 7 FCC Rcd 8629, n. 4 (Rev. Bd. 1992). Although rent and other details may be negotiated in the future, the basic terms of a tower lease must be negotiated in order to possess "reasonable assurance." Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331, 4332, para. 11 (1991), citing National Innovative Programming Network of the East Coast, 2 FCC Rcd 5641, 5643, para. 11 (1987).

An applicant is required to negotiate with the site owner in order to possess "reasonable assurance." Dutchess Communications Corp., 101 FCC2d 243, 253, para. 14 (Rev. Bd. 1985). Some basic negotiations between the applicant and the site owner must occur in order to constitute "reasonable assurance." Cuban-American Limited, 2 FCC Rcd 3264, 3266, para. 13 (Rev. Bd. 1987), rev. denied, 5 FCC Rcd 3781, para. 2 (1990). Even if a site owner would "favorably consider"

use of his property and would at a future date commence "negotiations for finalizing arrangements," this is insufficient. Lee Optical and Associated Cos. Retirement and Pension Fund Trust, 2 FCC Rcd 5480, 5486, para. 23 (Rev. Bd. 1987).

Accordingly, based on applicable Commission precedent, the December 1991 understanding with Mid-Ohio did not constitute "reasonable assurance" of a tower site. The March 2, 1994, letter from Mid-Ohio to the Westerville applicants confirms that their December 1991 tower site arrangements, including those of ASF, did not meet Commission requirements. Therefore, a tower site availability issue must be specified.

WHEREFORE, in view of the foregoing, ORA requests that its supplement be accepted and that the foregoing issue be specified against ASF.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

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April 21, 1994

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March 2, 1994

Charles W. Wilburn, Esq.  
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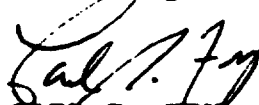
RE: Mid-Ohio Communications, Inc. / WBBY-FM / Lease of Assets

Dear Mr. Wilburn:

This correspondence is to advise you that all of the real estate and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies which was utilized in regard to the broadcast operation of WBBY-FM has been sold to Spirit Communications, Inc. As you are aware, it has been over two years since the previous owner advised you that if you were awarded the construction permit for the frequency that the previous owner would be willing to negotiate with you regarding the possible lease of the real estate and/or personal property previously involved with the operation of the station. The previous owner has never been advised by you or anyone that a new constructive permit has been issued in regard to the frequency, and the real estate and personal property has now been sold. I am unaware of the new owner's intent in regard to the real estate or the personal property and if you wish to discuss the matter with the new owner, please contact Mr. John Shumate, Spirit Communications, Inc., 114 Dorchester Square, Westerville, Ohio 43081.

Since the real estate and personal property are no longer available for lease by Mid-Ohio Communications, Inc., or affiliated companies, you need to make appropriate arrangements as you deem necessary or as may be legally required in regard to your Application filed with the FCC. If you have any questions regarding this correspondence, please feel free to contact me.

Sincerely,

  
CARL B. FRY

/lt

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 21st day of April, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Supplement to Second Motion to Enlarge the Issues Against ASF" to the following:

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Federal Communications Commission  
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Washington, D.C. 20554

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Stephen T. Yelverton

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